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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1608

PEARCE JOHNSON, ET AL, PETITIONERS

v.

ROGERS C. B. MORTON, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MRS. SAM WILSON, JR. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. A-1 through A-10) is reported at 456 F.2d 68, and its opinion denying rehearing and rehearing en banc (Pet. App. B, p. B-1) is reported at 456 F.2d 74. The judgment of the Court of Appeals issued as mandate (Pet. App. C, p. C-1) is not reported. The memorandum opinion and order of the district court (Pet. App.. D, pp. D-1 through D-30) is not reported.

JURISDICTION

The Court of Appeals denied the petition for rehearing and rehearing en banc on March 13, 1972 (Pet. App. B), and the petition for a writ of certiorari was filed on June 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Petitioners have alleged an injury in fact to an interest protected by the Federal Land and Water Conservation Fund Act arising out of the approval by the Secretary of Interior of federal matching funds for the acquisition of a state park.

STATUTES INVOLVED

The Land and Water Conservation Fund Act of 1965 (16 U.S.C. §§460e-4—460e-11) (Pet. App. E, pp. E-1—E-18) is involved. Article 978f-3a of the Texas Constitution and Article 6081r, Texas Revised Civil Statutes, are involved.

STATEMENT

On November 10, 1970, the Texas Parks and Wildlife Commission voted to preserve a portion of Mustang Island as a state park. One-half the purchase price for the park to be purchased from Mrs. Sam Wilson, Jr., was to be paid with federal matching funds. The Secretary of the Interior approved federal matching funds for the purchase on December 16, 1970. Pearce Johnson, Don Kennard, Ben Atwell and Peyton Walters ("Petitioners") filed their action to prevent the consummation

of the purchase. The District Court permanently enjoined the park purchase. The Court of Appeals reversed the District Court and dismissed the action because the plaintiffs' allegations failed to demonstrate standing in any of them to challenge the park purchase.

For standing, each Petitioner alleged that he had no interest in Mustang Island but that funds would not be available for park purposes in other parts of Texas if Mustang Island were purchased. It was also alleged that the purchase of Mustang Island was not in accordance with Texas' State Comprehensive Otudoor Recreation Plan (SCORP). SCORP, a multi-volume plan for park acquisition and development, was prepared by the Texas Parks & Wildlife Department at the direction of the Secretary of Interior pursuant to the Land and Water Conservation Fund Act in order to qualify Texas to receive federal matching funds for park acquisition and development.

Under the Act the Secretary or his agent makes the final determination whether proposed projects are in accordance with SCORP. The Mustang Island project was judged to be in accordance with SCORP by the Executive Director of the Texas Parks & Wildlife Department, by a majority of the Texas Parks & Wildlife Commission, by the Planning Division of the Mid-Continent Region of The Bureau of Outdoor Recreation (BOR), by the Grant Division of the Mid-Continent Region, by the Regional Director of BOR, and by the Director of BOR in Washington.

As to their individual interests as plaintiffs, Johnson alleged he as state liaison officer did not submit the application for federal matching funds and that he also attempted to retrieve the application from the hands of the Bureau of Outdoor Recreation. Ben Atwell alleged only that he is a "duly elected State Representative from Dallas County, Texas." Don Kennard alleged only that he is a "duly elected State Senator from Tarrant County, Texas." Peyton Walters alleged that he is Judge of Polk County, Texas, and that the purchase of Mustang Island would preclude the purchase of park lands in Polk County. It was also alleged that development of existing parks beyond "first phase development" would be halted. The Petitioners also alleged that they represented a class consisting of "all Texas citizens who are for the orderly development of Texas Parks and Recreational Facilities in accordance with the State Comprehensive Outdoor Recreational Plan." The district court, however, ruled that the petitioners had not identified an adequately defined and clearly ascertainable class of persons, and that the suit could not properly be maintained as a class action. The petitioners did not appeal this ruling to the Court of Appeals.

The district court deferred its decision on the threshold question whether the plaintiffs' allegations were sufficient for standing until the evidence had been heard, then found that the Petitioners had standing in their individual and official capacities to challenge the Secretary's approval of funds for Mustang Island. The Court

of Appeals reversed the District Court and sustained Mrs. Wilson's contention that the allegations of the plaintiffs were not sufficient to show an injury in fact to an interest protected by the Federal Land and Water Conservation Fund Act.

Respondents contended in the Court of Appeals that the Petitioners' allegations of injury resulting from the challenged action of the Secretary failed to show any injury in fact to any plaintiff in his official or individual capacities. The Court of Appeals sustained this contention. It held that "at best, the injury complained of amounts to a frustration of [the Petitioners'] interest in the allocation of state funds for recreational purposes." (Pet. App. A, A-9). The Court of Appeals stated that the decision of the Texas Parks & Wildlife Commission "to devote all available state funds to the acquisition and development of Mustang Island" is a matter of "state policy to which the Secretary of the Interior is not privy." (*Id.*).

ARGUMENT

Petitioners' contentions were presented to the court below and were rejected after careful consideration. The decision of the Court of Appeals in this case comports fully with this Court's decisions in *Sierra Club v. Rogers C. B. Morton*, _____ U.S. _____, 31 L.Ed.2d 636 (1972) [No. 70-34, decided April 19, 1972, 40 Law week 4397], *Data Processing Service v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970). The holding below is therefore correct, and there is no conflict of decisions or other reason for further review.

1. The court of appeals correctly applied the dual test of standing articulated by this Court in the *Camp* and *Barlow* cases. Assuming arguendo as did the court below that the Petitioners' alleged interests "as concerned citiezns for orderly development of recreational resources" and as "public officials charged with a public trust" are within the zone of interests protected by the relevant statute, the Land and Water Conservation Fund Act, the Petitioners failed to allege an injury in fact to that interest arising out of the action complained of. The "action" is the approval of federal funds by the Secretary. The alleged "injury" is that if these funds are allocated to Mustang Island, funds will not be available for park land that the Commission *might* decide to purchase in other areas of the state and as to which the Commission *might* decide to apply for federal matching funds.

As the court below stated, the "injury" complained of amounts to a frustration of their interest in the allocation of state funds for recreational purposes. Disappointment that a benefit has been conferred in some area in which the complainant does not have a direct interest is not sufficient for standing. *Harrison-Halsted Community Group v. Housing & Home Finance Agency*, 310 F.2d 99, 105 (7th Cir. 1962); *Paducah Junior College v. Sec'y of Health, Education & Welfare*, 255 F. Supp. 147 (W.D. Ky 1966). Moreover, contrary to Petitioners' allegations, the Parks & Wildlife Commission has *not* abandoned the Lake Livingston project. Moreover, despite lengthy testimony on this subject, the

district court did *not* find that the Livingston project had been precluded by Mustang Island. The district court did *not* find that Mustang Island would exhaust federal funds for other Texas park projects. The Attorney General *has* formally ruled that the contract to purchase Mustang Island is a valid and binding obligation of the State of Texas. His opinion is attached as Appendix A.

Contrary to Petitioners' contentions (Pet. 8-10), the decision of the court below in no way conflicts with this Court's decision in *Sierra Club v. Morton*. In the *Sierra Club* case injury in fact was clearly alleged. Certainly, as this Court stated in the majority opinion in *Sierra Club*, development that "would destroy or otherwise affect the scenery, natural and history objects and wildlife of the park and impair the enjoyment of the park for future generations" is harm within the concrete detriment requirement for standing. The opposite situation is presented in the instant case. The Petitioners seek to *prevent* the establishment of a park on an island that is threatened with commercial development. Certainly if Justice Douglas' analysis had been adopted by the majority in *Sierra Club*, Mustang Island itself would be a party respondent in the instant case. Certainly, as the Petitioners must and do admit, the effect of the Secretary's action is no "injury" to Mustang Island or to those persons who wish it preserved and protected against commercial development.

2. Contrary to his allegations, Johnson has no special interest in his *former* official capacities sufficient for

purposes of standing. (Governor Preston Smith has replaced Petitioner Johnson as Chairman of the Parks & Wildlife Commission and as State Liaison Officer). As Chairman of the Commission Johnson was simply outvoted by the other two Commissioners. The undisputed effect of the Commission vote is to commit *State* funds to the project. Clearly the frustration of a state official resulting from his being outvoted in the allocation of state funds for park land acquisition is not an "injury" arising out of the subsequent approval of *federal* funds by the Secretary. The Secretary's action has nothing whatever to do with the allocation of state funds.

Federal funds were approved by the Secretary upon the application of the Parks & Wildlife Commission. The Parks & Wildlife Commission, which undisputedly acts by majority vote, is designated by law as the entity to submit applications for federal matching funds.[1] It is not the intent of the Land & Water Conservation Fund to protect the questionable prerogative of the State Liaison Officer to submit applications. The purpose clause of the Act does not mention the State Liaison Officer.[2] The entire Act does not mention the State Liaison Officer.[3] *Leuthold v. Camp*[4] and *Nuesse v. Camp*[5] cited by the Petitioners are not in conflict with the decision of the court below; the cases are not rele-

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[1] Art. 6081r, Tex. Rev. Civ. Stats. An.
[2] 16 U.S.C. §460e-4
[3] 16 U.S.C. §§460e-4 through 460e-11
[4] 405 F.2d 499 (9th Cir. 1969)
[5] 385 F.2d 694 (D.C. Cir. 1967)

vant. Both involve state officials with clear duties under state law that are in possible conflict with duties under federal law. The "State Liaison Officer" has *no* duties under state law. Neither the Constitution nor any statute of the State of Texas grant any authority or impose any duties on a "State Liaison Officer." On the contrary, the position is purely a creation of the BOR Manual for the convenience of the Secretary of the Interior. The duty of administering federal funds received by Texas under the Land and Water Conservation Fund Act is plainly imposed upon the Parks & Wildlife Department. The Parks & Wildlife Department is run by the Executive Director under the policy direction and guidance of the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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JULY 5, 1972

APPENDIX A

THE ATTORNEY GENERAL OF TEXAS

CRAWFORD C. MARTIN
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

May 25, 1972

Opinion No. M - 1130

Re : Validity of contract involving acquisition of Mustang Island by the State of Texas, obligations upon the present Commission and remedies available to seller in case of dishonor by the State.

Honorable James U. Cross
Executive Director
Parks and Wildlife Department
John H. Reagan Building
Austin, Texas 78701

Dear Mr. Cross :

In your recent request for opinion of this office, you state that instruments constituting a contract were executed on behalf of the Texas Parks and Wildlife Department by former Executive Director J.R. Singleton and former Acting Executive Director, Robert G. Mauermann, with Mrs. Ada Rogers Wilson concerning the sale of her interest in Mustang Island to the State of Texas. You ask the following questions :

1. Is the contract valid?

2. If the contract is determined to be valid, what are the contractual obligations of the present Commission?

3. If the present Commission chooses not to honor the contract, what would be Mrs. Ada Rogers Wilson's remedy at law?

In answer to your first question you are advised that Article 978f-3a, Sec. 3, Vernon's Penal Code, provides in part that :

> "The Parks and Wildlife Commission shall have power and authority to appoint an Executive Director who shall be the chief executive officer of the Parks and Wildlife Department and shall perform its administrative duties ..."

We are advised that there were in effect at the time of the execution of these contracts, resolutions of the Commission specifically authorizing the execution of land purchase contracts by the Executive Director.

From an examination of the instruments and the facts before this office, we hold that the contract is valid and duly authorized at least by a majority of the members of the Commission at the time of its execution and it is currently valid and legally binding as an obligation of the State of Texas. They appear to be for a lawful purpose and are in acceptable form. In our opinion, nothing has happened to change the legal status of the contract since its execution.

In answer to your second question, wherein you ask what are the contractual obligations of the present Commission, you are advised that the contractual obligations of the present Commission are the same as those of the Commission that authorized the execution of the contracts, which duty and obligation is to carry out the terms and conditions of the contract. All instruments in this connection which were duly executed and valid are still

binding upon the state, including the voucher previously submitted to the Comptroller of Public Accounts. Although the membership of the commission has changed and its number has been increased, it nevertheless remains the same legal entity that authorized the execution of the contract. The new membership, however, is not required affirmatively to ratify the acts of an earlier commission.

It is possible that this second question is inquiring further than the above answer would indicate, and that you are asking what action must this present Commission take now. If this be the case, the answer would be, "None." The contracts were executed, the machinery for closing the transaction was initiated and the transaction would have long since been consummated had there not been an injunction issued by the Federal District Court for the Western District of Texas. This injunction has now been set aside by the Fifth Circuit United States Court of Civil Appeals. There exists no present legal impediment to the closing of the transaction and administratively the same should be so processed unless stopped by affirmative action of a majority of the Commission. The rights and responsibilities of a state under a contract are generally the same as those of individuals and the obligations arising are binding on the state. 52 Tex. Jur. 2d 740, State of Texas, Sec. 31; 81 C.J.S. 1122, States Sec. 25; 49 Am. Jur.285, States, etc., Sec. 74, and many cited cases therein.

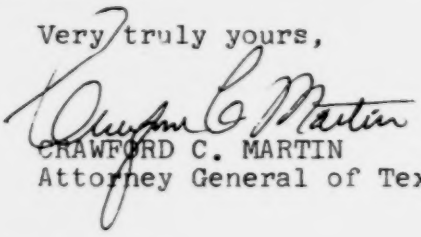
In answer to your hypothetical third question concerning the seller's remedy at law in the event the Commission chooses not to honor the contract, you are advised that this office will presume that the present commission will honor its valid contractual obligations and perform its legal duties.

For this office to set forth the various legal remedies of the seller, Mrs. Wilson, in the event the Commission breaches its contractual obligations would be to render legal advise for the benefit of unauthorized private individuals and a violation of Article 4399, Vernon's Civil Statutes.

SUMMARY

The contract involving the acquisition of Mustang Island by the State of Texas constitutes a valid, binding obligation of the State of Texas, and the contractual obligations of the present Commission are to carry out the terms and conditions thereof.

Very truly yours,



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APPROVED :
OPINION COMMITTEE

Kerns Taylor, Chairman
W.E. Allen, Co-Chairman